National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Warm Brothers Construction Company, Case 9-CA-25422

506-2001-5000, 506-4033-5500, 506-4067-0100

This Section 8(a)(1), (3) and (5) case was submitted for advice on whether the Employer was bound to and repudiated a collective-bargaining agreement with the Union and whether two employees were engaged in protected concerted activity when they refused to work because of an alleged breach of that agreement.

FACTS

The Employer is a general contractor in the building and construction industry, and is not a member of any multiemployer group. It has not signed a collective-bargaining agreement with the Union. In October 1986, at the Union's request, the Employer hired an employee from the Union's hiring hall to operate an hydraulic crane at a jobsite. The Union alleges that at this time the Employer refused to sign a collective-bargaining agreement, but promised to "live according to the contract 100 percent." The Employer denies making this promise. Nevertheless, it paid the employee Union wage rates and fringe benefits, and deducted Union dues.

During a meeting in December 1987 or January 1988, the Union asked the Employer to sign its area collective-bargaining agreement.(1) According to the Union, the Employer's owner refused, but again promised to abide by the agreement, and said he might sign an agreement in the future. The Employer denied promising to abide by the Union's collective-bargaining agreement at this meeting, but admitted agreeing to pay Union wages and benefits to the two Union members it employed at the time.

The Region's investigation revealed that the Employer abided by the terms of the Union contract in that it paid its two Union-member employees at the contract wage rate; paid into all Union fringe benefit programs on their behalf; deducted their Union dues; and made written requests to the Union for the two Union members' services. On several occasions, the two Union-member employees received contractual overtime pay after complaining to the Employer about not receiving it. On the other hand, the investigation disclosed the following evidence that the Employer failed to abide by the contract: the use of "nonunion" employees on certain machinery covered by the Union contract, although the Union states that it was unaware this occurred; the failure to pay an employee holiday pay for a certain period; the failure to pay the 40-hour contractual wage guarantee on some occasions; and the apparent use of nonunion subcontractors employing nonunion employees in jobs covered by the Union's contract.

Under the current Union area collective-bargaining agreement, signatory employers were required to hire oilers to assist the crane operators, effective May 1, 1988. The Employer's two employees who were Union members knew that the agreement's clause requiring oilers became effective May 1. Each employee decided to refuse to work without an oiler, but they did not discuss their plans with each other; also, they worked at different jobsites. On May 2, the employees refused to work because the Employer had not hired oilers, and both were fired.

ACTION

We concluded that complaint should issue, absent settlement, because the Employer was bound to, and not privileged to repudiate mid-term, the Union's current area collective-bargaining agreement, and the employees' conduct was concerted

activity under Interboro.[(2)]

The Employer is "engaged primarily in the building and construction industry" within the meaning of Section 8(f) of the Act. In Garman Construction Company,[(3)] the employer had not signed new Section 8(f) agreements, but it had continued to abide by several clauses in the unions' master agreements. Thus, the employer contributed to the unions' fringe benefit funds, paid union scale wages, and hired only union members. Nevertheless, the Board found the "adoption-by-conduct doctrine" inapplicable to Section 8(f) cases, and that the employer was not bound to the unions' master agreements.[(4)] In view of the Board's decision in Garman, we concluded that it should not be argued that the Employer adopted the Union's area agreement by conduct.

Rather, we conclude that the Employer orally entered into a Section 8(f) contract with the Union when, in 1986, it gave the Union assurances that it would abide by "100 percent" of the terms of the contract, but would not sign it, and in 1987, when the Employer again stated that it would abide by the terms of the contract. First, we conclude that H.G. Heinz Co. [(5)] applies to a Section 8(f) agreement. We recognize that John Deklewa & Sons, Inc.[(6)] involved a written and signed agreement. However, the policy underlying this aspect of Deklewa is that parties should be bound to their agreements. Thus, where there has been a meeting of the minds on all terms and conditions of employment, the policies of the Act would require the parties to be bound thereby. Thus, the Employer in the instant case was bound to the contract when it orally agreed to abide by its terms and conditions of employment. Garman is distinguishable from the instant case in that there the administrative law judge found that the employer was bound to the contract solely on the basis that the employer adopted the contract by conduct because it complied with the terms of the agreement. Here, in contrast to Garman, although the Employer refused to sign the contract, the Employer orally agreed to all of the terms of the contract. [(7)]

Since a collective-bargaining agreement existed between the Union and the Employer, we further conclude that the two employees were discharged for engaging in protected concerted activity. Under Interboro and its progeny, an employee acting alone engages in concerted activity when the employee, in good faith, reasonably asserts a right under a collective-bargaining agreement.[(8)] The employee's conduct is considered a part of the concerted activity that gave rise to the agreement, even when the employee mistakenly believes his/her complaint involves a contract clause or fails to mention the contract, and regardless of the complaint's merits.[(9)] Of course, a collective-bargaining agreement must exist before individual employee conduct asserting a contractual right can be considered concerted activity under Section 7.[(10)] In this case, the employees individually clearly raised a complaint regarding Employer noncompliance with a contract clause, to which the Employer was bound, as discussed above. Thus, since the Union's area agreement applied to the Employer, the Employer was obligated to hire oilers by May 1, 1988. Accordingly, under Interboro, the Employer violated Section 8(a)(1) and (3) by discharging each employee who refused to work without a Union-supplied oiler.[(11)]

[*FOIA Exemption 5*

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However, "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action." [(12)]4 Meyers cited Ontario Knife Co. v. NLRB with approval.[(13)] In that case, the court found no concerted activity when one employee left her job to protest a work assignment. The employee and another employee had discussed the problem with each other, and together they had discussed the problem with supervisors. However, no evidence was presented showing that employees other than the one who walked out either participated in or approved of the walkout, or that the employee was "looking toward group action" by walking off her job.[(14)]6

[*FOIA Exemption 5*

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Finally, since the contract required the Employer to use crane operators and oilers referred by the Union, the Employer's

midterm firing of the two Union-referred crane operators, and filling oiler positions with employees not referred by the Union and failing to apply the contract to them, constituted a Section 8(a)(5) contract repudiation.

Consistent with the foregoing analysis, a Section 8(a)(1), (3) and (5) complaint should issue, absent settlement, based on Interboro and Deklewa principles.

H.J.D.

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[1] This agreement apparently was the "short-form" agreement for nonmembers of an employer association, and incorporated the area Union-association agreement with specific exclusions, such as, among other things, the no-strike and grievance-arbitration provisions.

[2] Interboro Contractors, Inc., 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). The Board affirmed the continuing viability of Interboro in Meyers Industries, Inc., 268 NLRB 493 (1984), remanded, 755 F.2d 941 (DC Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985), on remand, 281 NLRB No. 118 (Sept. 30, 1986), enfd. 835 F.2d 1481 (DC Cir. 1987).

[3] 287 NLRB No. 12 (Dec. 14, 1987).

[4] Id., slip op. at 4, n.5.

[5] 311 U.S. 514 (1941).

[6] 282 NLRB No. 184 (Feb. 20, 1987).

[7] Compare McLean County Roofing and Accurate Roofing, 290 NLRB No. 82 (July 29, 1988), where the Board held that an employer in a Section 8(f) relationship is not bound to a collective-bargaining agreement when the employer only complies with most of the terms of the contract, but does not agree to all of the material terms of the contract. Id. slip op. at 6-7.

[8] Interboro Contractors, Inc., supra, 157 NLRB at 1298. The Supreme Court affirmed this principle in NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984).

[9] See NLRB v. City Disposal Systems, Inc., supra, 465 U.S. at 839-41; Interboro Contractors, Inc., supra, 157 NLRB at 1298; Bechtel Power Corp., 277 NLRB 882 (1985); Architectural Research Corp., 267 NLRB 996, 1005 (1983), enf. denied, 748 F.2d 1121 (6th Cir. 1984); Maryland Shipbuilding & Dry Dock Co., 256 NLRB 410, 413 (1981), enf. denied 683 F.2d 109 (4th Cir. 1982); John Sexton & Co., 217 NLRB 80 (1975).

[10] For example, in Comet Fast Freight, Inc., 262 NLRB 430, 431 (1982), the Board pointed out that the Interboro Board relied on the facts that the employee acted on behalf of his fellow employees, and that he attempted to enforce the collective-bargaining agreement. Interboro was inapplicable in Comet Fast Freight, because no collective-bargaining agreement existed and the charging party was the only employee who complained about one of the employer's trucks being unsafe.

[11] As noted above in footnote 1, the agreement to which the Employer was bound did not contain a no-strike clause. Therefore, an argument that the employees breached such a clause by refusing to work and thereby engaged in unprotected activity is without merit.

[*FOIA Exemption 5*

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14 Meyers I, supra, 268 NLRB at 498. (Emphasis in the original).

15 Id. at 497, citing 637 F.2d 840 (2d Cir. 1980).

16 Ontario Knife Co. v. NLRB, supra, 637 F.2d at 844-845, quoting Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964). See also Pennsylvania Compensation Rating Bureau, 266 NRLB 396 (1983), a pre-Meyers case, where three employees separately decided to write comments on warning notices the employer issued them. No evidence was presented showing the employees interacted with each other in any way regarding the means or content of their comments, or that the charging parties' action was intended to prepare for future employee activity or was supported by other employees. The Board adopted the administrative law judge's finding that the charging parties had not engaged in concerted activity, although their comments had reflected a shared point of view. Id. at 400.